

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be argued by
GERALD GORDON

75-7608

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee*,

—against—

LEON LEVY, *et al.*, *Defendants-Appellants*.

EGON TAUSSIG, *Plaintiff-Appellee*,

—against—

SIDNEY M. ROBBINS, *et al.*, *Defendants-Appellants*.

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees*,

—against—

ERIC HAUSER, *et al.*, *Defendants-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR DEFENDANT-APPELLANT
OPPENHEIMER FUND, INC.**

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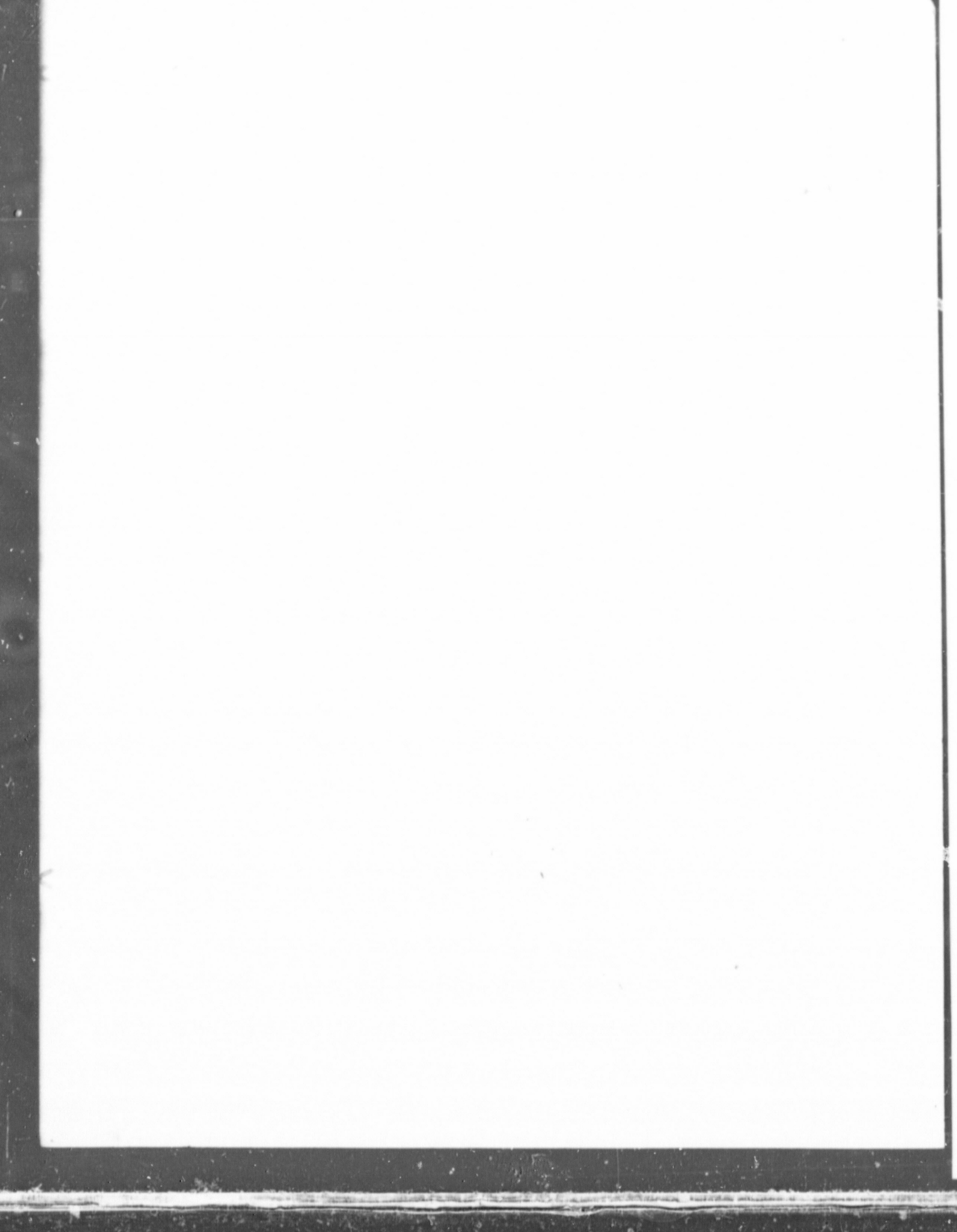
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<u>Parkinson v. April Industries, Inc.</u> , 520 F.2d 650 (2d Cir. 1975)	4, 5
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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT
OPPENHEIMER FUND, INC.

POINT I

THIS COURT HAS JURISDICTION
OF THE WITHIN APPEALS.

In their opposing brief, the plaintiffs-appellees (the "appellees") have engaged in a lengthy discussion and attempted explanation of the collateral order doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1947) for the purpose of convincing this Court that the District Court's rulings are not appealable. However, the very controlling cases cited by the appellees in their brief demonstrates beyond peradventure that the District Court's rulings are appealable.

Thus, in their brief (page 21), appellees admit that the Supreme Court in Eisen IV held that Rule 23 cost of notice determinations are appealable, that the notice must be given to all identifiable class members, and "the usual rule is that a plaintiff must bear the cost of notice to the class." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Appellees' discussion of cases not within the collateral order doctrine rule because a discretionary ruling was

involved not only fails to becloud the proper test for jurisdiction in this Court, but actually confirms our position as set forth (page 23) in language from General Motors Corp. v. City of New York, 501 F.2d 630 (2d Cir. 1974), i.e., the "power to shift notice costs and forego individualized notice, as in Eisen", is a "finite and conclusive determination of judicial power" and is governed by the collateral order doctrine. General Motors Corp. v. City of New York, supra, at 647. This Circuit in Eisen III emphatically stated that its prior ruling requiring individual notice where identification could be made of any number of members of the class was not discretionary. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1015 (2d Cir. 1973), vacated and remanded 417 U.S. 156 (1974). It is undisputed here that all members of the class can be identified. The ruling below was not a discretionary ruling, but a finite and conclusive determination of judicial power reviewable herein.

Accordingly, appellants here need only satisfy the three-pronged test, i.e.

(1) whether the class action determination below is fundamental to the further conduct of the case;

(2) whether review of the rulings is separable from the merits; and

(3) whether the rulings will cause irreparable harm to defendants in terms of the time and money spent in defending the class action.

All of the requirements as stated in our initial brief have been amply met. Clearly, appellees will not continue the action as a class action if properly forced to pay the costs of notice, review is separate from the merits and defendants will incur substantial costs in defending these claims. Indeed, appellees admittedly not only could not continue the action if required to pay the cost of notice (pages 13, 54); they also doubt such costs are taxable if appellees lose on the merits.

Appellees further claim that this Court lacks pendent jurisdiction to hear the manageability issue raised by appellants. They attempt to avoid this Court's statement in Parkinson v. April Industries, Inc.

520 F.2d 650, 658 (2d Cir., 1975) that in a sprawling class action questions of manageability may give rise to an immediate appeal by inferring this case does not involve an extraordinary situation. Furthermore, as pointed out in the General Motors Corporation case and admitted to by appellees (page 30), the "guiding principle to inform the discretionary application of pendent jurisdiction is whether review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order." 501 F.2d at 648. Here, appellant Fund claims the requirement of giving direct notice to 68,000 persons who are not members of the class affects the manageability of the class action. This is clearly an overlapping factor: it is also extraordinary. This litigation is not in its early stages, but is seven years old. Accordingly, there would be no abuse of discretion if this Court retains jurisdiction to hear the manageability issue which has been amply covered in the various briefs filed by all appellants and requires no further reply here.

POINT II

THE DISTRICT COURT DID NOT HAVE DISCRETION
TO IMPOSE THE COST OF IDENTIFYING MEMBERS OF
THE CLASS ON DEFENDANT OPPENHEIMER FUND, INC.

Contrary to appellees' argument, the clear principle reiterated by this Court in Eisen III and the Supreme Court in Eisen IV that plaintiffs must initially bear the cost of notice was improperly ignored by the District Court's rulings below. Appellees are unable to cite one case since Eisen III which imposed such cost on the defendants, because plaintiffs filing class actions and courts ruling on class action motions are clearly aware of a plaintiff's responsibility in such matters.

To avoid the obvious rule, appellees' proposal to use a shotgun mailing to all shareholders of the Fund likewise ignores the requirement that individual notice be given to all class members whose identity can be reasonably ascertained. If appellees do not wish to bear such cost, then their class action, like Mr. Eisen's class action, must be dismissed. Appellees' further argument that their action falls within the exception to the usual rule does not sustain the burden imposed on

them. The Fund is a nominal defendant which makes adequate disclosure of this litigation in its prospectuses pursuant to which its shares are sold to the public. The Fund is not required to finance the Rule 23(c)(2) notice requirements for which appellees are responsible.

Furthermore, the cases cited by appellees for the proposition that notice can be mailed to thousands of persons who are not members of the class do not support their argument. In Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) the notice sent to persons whose names were entered into the transfer lists in the two-week period following the last day of the class period was obviously designed to allow persons purchasing shares at the end of the period to receive notice since the purchase and transfer would not take place simultaneously. In Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) the plaintiffs purported to represent all present and past Uni-Card holders. Thus, notice inserted in a regular monthly mailing to cardholders went only to members of the class.

Appellees have also failed to respond to the warning that a mailing to all shareholders of a defendant issuer is an invitation to problems of manageability, prejudice and solicitation. Such a ruling also would result in a substantial watering down of the cost of notice rule, since few issuers would be willing to have such a notice mailed to a significant number of their shareholders who were not members of the class. Even under the facts of this case, such a mailing cannot be countenanced and the District Court recognized the problem, yet imposed the cost on the Fund! An obvious inconsistency in the District Court's ruling was its holding that it would be improper to exclude class members who no longer were shareholders of the Fund (Joint Appendix, page 175) and yet imposed their notice cost on the Fund. The appellees argue that appellants are seeking to identify the class in a manner designed to increase the cost of notice, but it was the appellees in their class action motion who designated the class as including all purchasers in the March 28, 1968-April 24, 1970 period. The District Court's consid-

eration that the cost was relatively modest added a factor which is improper. Indeed, the appellees will not pay that "relatively modest" cost, a sum which coincidentally was about the same amount that Mr. Eisen refused to pay (and which only amounted to 10% of the cost of notice in Mr. Eisen's action). It is thus clear that the imposition of the cost of notice on the Fund was improper and cannot and should not be sustained by this Court.

CONCLUSION

It is respectfully urged that the Court reverse the rulings of the District Court and rule that appellees must bear the cost of identifying the names of members of the class, or, in the alternative, dismiss the class action upon the ground it is unmanageable, without prejudice to the continuance of so much of the claims asserted in the complaints as refer to alleged individual rights of appellees Sanders, Shaev and Taussig against defendants.

Respectfully submitted,

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Oppenheimer Fund, Inc.

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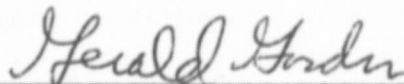
CERTIFICATION OF SERVICE

I, GERALD GORDON, an attorney admitted to practice in this Circuit, do hereby certify that on this 15th day of March, 1976, two copies of the Reply Brief for Defendant-Appellant, Oppenheimer Fund, Inc., were hand delivered to the following enumerated counsel at their respective addresses:

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